

# The New Zealand Bill of Rights Act 1990 and a Post September 11 Morality; Community rights versus Individual Rights.

**[Pre Published Draft]**

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Within this article I seek to exam the place of the New Zealand Bill of Rights Act 1990 (NZBRA) in the changing world of human rights protection post September 11, 2001. I will argue that the non-entrenched NZBRA, while traditionally subject to significant criticism, may now present a favourable world model for the effective democratic protection of substantive human rights. The anti-terror actions taken by the United States (U.S) and the United Kingdom (U.K.) following the terrorist attacks of September 11, 2001 appear to give rise to a swing in human rights ideology. These acts represent a different form of human rights derogation from that which has traditionally been accepted. Apart from a small number of fundamental or core rights human rights are most often subject to some form of compromise within domestic systems of right protection. Notwithstanding this observation, the actions of the U.S. and the U.K., post September 11, appear to usher in a new form of compromise based upon state or community necessity. This new form of compromise has the potential to significantly modify the nature of traditional human rights ideology from the inviolable supremacy of an individual's rights to the supremacy of broader democratic, structural or societal rights. Consequently, if such a shift were to solidify to the extent that derogations from the protection of an individual's fundamental rights were held to be legitimate where society is faced with any type of amorphous threat, then a corresponding shift in appreciation of entrenchment versus non-

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entrenchment would also likely occur. The result would therefore be that right protection systems traditionally seen as weak, such as in operation within New Zealand and the U.K. could be seen as providing greater right protection through their promotion of intra-constitutional activity. Entrenched systems on the other hand, could lose favour as their rigid and concrete procedural protections provide little flexibility and therefore little intra-constitutional encouragement to executive administrations.

*Terrorism & the Protection of Human Rights:*

The actions of the U.S. and the U.K. in their “war against terror” form an exceptional anomaly to the ideology of the traditional human rights movement. The threat presented by terrorism is not new. However, the events of September 11, 2001 signalled a shift in global emphasis as the threat of mass destruction became a foreseeable reality.<sup>1</sup> Von Schorlemer has highlighted that ‘[t]he events of September pose huge challenges to the agenda of human rights’.<sup>2</sup> This is undoubtedly one of the fundamental goals of international terrorism.<sup>3</sup>

Unlike previous acts of terror, the magnitude of the attacks of September 11 on the U.S. have in the words of Gross, ‘breached the balance between human rights and national security.’<sup>4</sup> Gross continues by noting that in relation to the U. S. executive

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<sup>1</sup> Von Schorlemer notes that ‘[t]here is a consensus that Osama bin Laden and Al Qaeda mark a new and more dangerous form of ‘sub-state terrorism’ than has been seen hitherto’, S. von Schorlemer, ‘Human Rights: Substantive and Institutional Implications of War Against Terrorism’, (2003) 14 EJIL 265, p. 270. See also the comments of the German Federal Minister for Foreign Affairs who has stated that ‘the [September 11 attacks] and its consequences have reoriented world politics and this is not without implications for human rights policy’ Joschka Fischer, Federal Minister for Foreign Affairs, ‘Anti-Terrorism Measures Are No Excuse for Human Rights Violations’, 58<sup>th</sup> Session of the Commission on Human Rights, Geneva, 20 March 2002, [www.unhchr.ch](http://www.unhchr.ch) as cited by von Schorlemer, p. 266.

<sup>2</sup> von Schorlemer, p. 266. von Schorlemer goes on to convincingly argue that human rights violations are in, and of themselves, a major cause of terrorism.

<sup>3</sup> von Schorlemer once again observes that,

*[t]errorists often aim to provoke an oppressive reaction by state authorities that will involve the latter in human rights violations, in order to create fear and dissatisfaction among the general public.*

Von Schorlemer, p. 274.

<sup>4</sup> E. Gross, ‘Trying Terrorists - Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights’, (2002) 13 Ind. Int’l & Comp. L. Rev. 1

decree on the establishment of special courts to try terrorists<sup>5</sup> that such a move was deemed necessary after,<sup>6</sup>

*... concern for the efficiency of the hearing, achieving deterrence at the expense of the pursuit of justice, and refraining from convicting innocent persons. In so doing, absolute priority is given to national security.*

However, while a central aim of terrorism is to disrupt the philosophical basis of democracy, commentators have been quick to classify the anti-terror actions of the U.S. and the U.K. with the use of traditional terminology. Justifying the actions of the U.K. and the U.S. as merely an exercise in right re-balancing Jack Straw, United Kingdom Foreign Secretary, has stated in interview that.<sup>7</sup>

*... the Human Rights Act ... has strengthened rights of those accused of crime, but you have to balance that with the right to life. Getting that balance is not easy – maybe we have to change the balance within our society.*

Under such an analysis the acts of the U.S. and to a lesser extent the U.K. are capable of reconciliation with the traditional delimitations of human rights ideology. The mere balancing of rights falls within the borders of the traditional realm of human rights discourse. Therefore, if viewed in this way the anti-terror acts of the U.S. and the U.K. are reconcilable with the observation of Professor Aharon Barak,<sup>8</sup> who stated that,

*[i]t is the fate of democracy that it does not see all means as justified, and not all the methods adopted by its enemies are open to it. On occasion, democracy fights with one hand tied. Nonetheless, the reach of democracy is superior, as safeguarding the rule of law and recognition of the freedoms of the individual, are an important component in its concept of security. Ultimately, they fortify its spirit and strength and enable it to overcome its problems.*

However, a central contention of this article is that the actions of the U.S. and the U.K. in the “war against terror” ought not to be viewed in traditional terms of ‘balance’ but rather that the anti-terror acts of these nations fall outside of the traditional exercise of right balancing or justified limitations. These actions therefore threaten to introduce a fundamental swing in human rights ideology in which community or structural rights will replace the inviolable nature of individual rights.

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<sup>5</sup> See Detention, Treatment, and Trial of Certain Non- Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (2001).

<sup>6</sup> Gross, p. 2.

<sup>7</sup> Jack Straw, United Kingdom Foreign Secretary, interview with Krishnan Guru-Murthy, ITN, Channel Four News, 11 March 2004.

<sup>8</sup> Israeli Supreme Court President.

Alternatively, at the very least, it will act to introduce a wide doctrine of state protection or state necessity.

### *Re-balancing?*

I contend that the traditional notion of a right re-balance applies in two distinct circumstances. Firstly a right re-balance may legitimately occur in the application of particular, counter rights. Examples of such rights include the right to privacy and freedom of speech. Secondly, right re-balancing may fall within traditional constitutional right limitations such as the existence of a state of emergency that acts to threaten the life of a nation. I contend that this latter circumstance implies the existence of a defined, identifiable and exceptional but temporary threat.

The acts of the U.S. and the U.K. fall outside, or at least sit uncomfortably with these re-balancing examples. Given the amorphous and speculative nature of the modern terror threat there exists the opportunity that anti-terror acts may pervade any number of aspects of civil liberties. Furthermore given the nature of this new terrorist menace the possibility exists that states will remain in a perpetual state of alert.<sup>9</sup> These characteristics of the post September 11 terrorist threat mean that it is not capable of reconciliation with the traditional notion of a right re-balance.<sup>10</sup> The “war on terror”

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<sup>9</sup> Eliza Manningham-Buller, Director-General of the United Kingdom Security Service, has noted in relation to the U.K.’s declaration of emergency and subsequent derogation from the ECHR that,

*I see no prospect of a significant reduction in the threat posed to the UK and its interests from international terrorism over the next five years, and I fear for a considerable number of years thereafter.*

As cited by the Joint Committee on Human Rights, paragraph 4, available at, <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/158/15804.htm#a4> as of 10 November 2004 at 5:05pm. The Eighteenth Report of the Joint Committee on Human Rights further notes that,

*[d]erogations from human rights obligations are permitted in order to deal with emergencies. They are intended to be temporary. According to the Government and the Security Service, the UK now faces a near-permanent emergency.*

*Ibid.*

<sup>10</sup> The Joint Committee on Human Rights stated in its Eighteenth Report that,

*In our view, this makes it absolutely imperative that an alternative way be found to deal with the threat that exists without derogating indefinitely from the most basic human rights obligations such as the right to liberty. Long-term derogations from human rights obligations have a corrosive effect on the culture of respect for human rights on which the effective protection of all rights depends. They undermine the State's commitment to human rights and the rule of law, and diminish the State's standing in the international community.*

has the potential to be anything but temporary and exceptional. Under such circumstances a post-September 11 morality threatens to immerse in which state necessity will act to trump individual rights in an uncontrollable myriad of circumstances. Consequently, a “right re-balance” potentially acts to mask the reality of the circumstances, which more appropriately speak of a permanent ideological swing.

Furthermore, in relation to the second contention of this article, such a shift could act to change attitudes towards constitutional systems of entrenched bills of rights. More flexibility could be seen to be necessary in order to allow the state to protect wider community rights over individual rights under the guise of state necessity. This would act to reverse the traditional notion of the constitutional protection of human rights from “entrenched is strong” and “non-entrenched is weak” to “flexibility is robust”, and “rigid is unusable”.

### *The anti-terror actions of the United States and the United Kingdom*

Brief discussion here of the anti-terror actions of the United States and the United Kingdom will serve two purposes. Firstly, it will illustrate that the actions of these test nations are more appropriately defined as right avoidance rather than acts of right rebalance. Secondly, it will provide support for my contention that a corresponding shift in attitude on the merits of entrenchment over non-entrenchment is also likely to develop.

#### *A The United States & a Post September 11 Morality*

The constitutional regime of the U.S. provides formidable protection for the human rights that are contained within it. Described by various commentators as rigid, solid, crystallised, or controlled<sup>11</sup> this written or ‘concrete’<sup>12</sup> constitution limits, through

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Ibid, paragraph 5.

<sup>11</sup> Refer A, Dicey, *Law of the Constitution* (10<sup>th</sup> ed.), Bryce, *Studies in History and Jurisprudence*, Vol 1, Essay 3, and Lord Birkenhead L.C. in *McCawley v The King* [1920] A.C. 691, PC respectively.

<sup>12</sup> P, Jackson, P, Leopold, O, Hood Phillips, *Constitutional and Administrative Law* (London: 8<sup>th</sup> edn. Sweet & Maxwell, 2001). p. 5.

double entrenchment, the availability of constitutional amendment.<sup>13</sup> Such a system empowers the judiciary with considerable authority as the higher law constitution allows for judicial review of legislative action.<sup>14</sup> Therefore the rights encapsulated within the U.S. Constitution's First and subsequent amendments are, although subject to judicial interpretation which at times is colourful, difficult to legitimately circumvent.<sup>15</sup> This reality may have a discouraging effect upon the executive administration. With little apparent encouragement to work within the system the temptation may arise to circumvent this rigid regime in favour of legal black holes within which flexibility is retained.<sup>16</sup>

The rigidity of this system may be heralded as a significant strength, in that by providing such protection the actions of governments will be ultimately controlled. However, the events of September 11 and the resulting fear of terror appear to indicate the contrary. Faced with terrorism as an actual or perceived threat, the U.S.

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<sup>13</sup> Such supreme or higher law is created by way of enacting doubly entrenched legislation. This is were a particular provision not only entrenches (sets a higher amending threshold, i.e. 75% of Parliament) other sections (single entrenchment) but entrenches itself within this higher amending threshold (double entrenchment). See Article V of the U.S. Constitution.

<sup>14</sup> This ability of the Courts to declare both Federal and State legislation unconstitutional was assumed in the now famous cases of *Marbury v. Madison* (1803) 1 Cranch 137. (The United State Supreme Court), and *Fletcher v Peck* (1810) 6 Cranch 87.

<sup>15</sup> Notwithstanding this observation, it cannot be said that the rights encapsulated within the U.S. Constitution are absolute. Judicial exercise of constitutional limitations has created a hierarchy of Rights within the U.S. system. While all Rights under the Constitution are potentially subject to a 'public interest' limitation, some rights attract a further restriction on the application of this limitation. This is often referred to as 'limitations on limitations'. Henkin, Neuman, Orentlicher, Leebron, *Human Rights* (New York, New York: Foundation Press, 1999). p. 220. The authors continue by stating that, (p. 222.)

*American jurisprudence has sought to refine the accommodation of individual rights to public interest by doctrines of "balancing" and "drawing lines"; by according different values to different individual rights and different weights to different public interests; and by prescribing different levels of judicial scrutiny to resolve the uncertainties of balancing and accommodation. The degree of scrutiny will often determine the outcome.*

This hierarchy of scrutiny applied by the U.S. judiciary has been described as 'strict', 'intermediate' and 'deferential review', the later only requiring proof of a "rational basis" on behalf of the government. Ibid, p. 220. Also refer to the cases of *United States v. Carolene Products*, 304 U.S. 144 (1938) (in particular the note of Justice Stone at 153, n. 4), *Reynolds v. Sims*, 377 U.S. 533 (1964), *Plyler v. Doe*, 457 U.S. 202 (1982), *Korematsu v. United States*, 323 U.S. 214 (1944). Notwithstanding this hierarchy, difficulty arises when state necessity intercedes to become of paramount importance, justifying in the eyes of some, derogation from fundamental rights.

<sup>16</sup> Although not pursued in this article, the relationship between each of these aspects of right protection in the U.S. is a close one. The actions of the U.S. government, post September 11, could therefore result in one of two things. Firstly, the change in emphasis that would result from a paradigm shift could act to weaken the public and judicial resolve on the protection of an individual's rights. Secondly, and perhaps more likely, such a change in emphasis could result in the rights under the U.S. Constitution being seen as "American" rights only applying to the American people and not "universal" rights applying to all human beings.

executive administration appear to have chosen to act with little regard to the consequences. It may be argued that with a rigid domestic system of protection, the muddled waters of international human rights has been identified as a more appropriate battle ground. Consequently, the extra-constitutional legal vagaries associated with “unlawful combatants” and the foreign territory of Guantanamo Bay, Cuba have been used by the U.S. in their anti-terror campaign.

B      *Constitutional Rights and Camp Delta, Guantanamo Bay, Cuba:*<sup>17</sup>

*Illegal Combatants & Guantanamo Bay:*

I contend that the use of the notion of “illegal combatants” has been utilised by the U.S. in an attempt to avoid the application of both domestic law and secondly, international humanitarian law. Furthermore, the use of Guantanamo Bay Cuba over mainland United States stands as a further example of attempted right avoidance.

As a result of the U.S. invasion of Afghanistan<sup>18</sup> a considerable number of Taliban and Al Qaeda operatives were taken into custody.<sup>19</sup> After their transportation to Guantanamo Bay these detainees, in their entirety, were classified as ‘illegal combatants’.<sup>20</sup> Three reasons were advanced in justification for such a classification. Firstly, it was held that the safeguards encapsulated within the Third Geneva Convention<sup>21</sup> did not apply to non-state actors.<sup>22</sup> Furthermore, as the conflict was not

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<sup>17</sup> For a general discussion of the reaction of the U.S. to the events of September 11, 2001 see, D. Cole, ‘The New McCarthyism: Repeating History in the War on Terrorism’, 38 Harv. C.R.-C.L. L. Rev. 1.

<sup>18</sup> Which commenced 7 October 2001.

<sup>19</sup> While ground forces entered Afghanistan on 19 October 2001, U.S. air strikes commenced on 7 October. For an analysis of the Bush administrations reaction to the events of September 11, 2001 see generally, M. Collier, ‘The Bush Administration’s Reaction to September 11: A Multilateral Voice or a Multilateral Veil?’, 21 Berkeley J. Int’l Law 715 (2003). See also J. Burns, ‘A Nation Challenged: The Taliban; Clerics answer “No, no, no!” and invoke fate of past foes’, New York Times, Sept. 22, 2001. Within a few weeks of the first detainees being taken to Guantanamo Bay, Cuba on 11 January, 2002 over 600 detainees were transported there. K. Dahlstrom, ‘Between Empire and Community: The United States and Multilateralism 2001-2003’, 21 Berkeley J. Int’l L. 662 (2003), p. 674.

<sup>20</sup> The transfer of these combatants to Guantanamo Bay began on 11 January 2002. Pursuant to an unannounced decision of President Bush on 18 January, 2002 it was stated that the Third Geneva Convention did not apply to the detainees, S. Murphy (ed) ‘Contemporary Practice of the United States Relating to International Law’, [2003] 96 AJIL 461, 477. See also ‘No PoW Rights for Cuba Prisoners’, BBC News Online, 27 January, 2002, at <http://news.bbc.co.uk/1/hi/world/americas/17848700.stm> as of 22 March 2004 at 2:30pm.

<sup>21</sup> Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

internal, it was believed that members of Al Qaeda did not come within Article 3 of each of the four Geneva Conventions. Thirdly, Al Qaeda combatants were not seen as meeting the requirements of Article 4(A)(2) of the Third Convention.<sup>23</sup> Upon later reflection and due to the urging of Colin Powell, U.S. Secretary of State, President Bush announced on 7 February, 2002 that the Third Geneva Convention did apply to members of the Taliban regime only. Despite this partial relinquishing of the U.S. position the President reiterated that all of the detainees, both members of the Taliban and Al Qaeda alike, were not entitled to PoW status.<sup>24</sup> The U.S. has therefore sought to distinguish the position of the detainees from that which is envisioned under the Geneva Conventions.<sup>25</sup>

Considering that many of these particular combatants, having been detained in Afghanistan, were not threats to the U.S. in any direct and immediate sense, the re-balance between individual rights hypothesis fails to provide an objectively viable justification. Additionally, I contend that the relationship between such a classification and the wider terrorist threat and its applicability to the U.S. is so tenuous so as to not legitimately come within any emergency powers which may

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<sup>22</sup> See quote of the U.S. Ambassador-at-Large for War Crimes Issues, Pierre-Richard Prosper below, at n. 18.

<sup>23</sup> Article 4(A)(2) provides;

*Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, included such organised resistance movements, fulfil the following conditions:*

- (a) that of being commanded by a person responsible for his subordinates;*
- (b) that of having a fixed distinctive sign recognisable at a distance;*
- (c) that of carrying arms openly;*
- (d) that of conducting their operations in accordance with the laws and customs of war.*

Speaking in relation to the U.S. classification of the Guantanamo detainees the U.S. Ambassador-at-Large for War Crimes Issues, Pierre-Richard Prosper stated that,

*[p]rivate persons lacking the basic indicia of organisation or the ability or willingness to conduct operations in accordance with the laws of armed conflict have no legal right to wage warfare against a state. ...In choosing to violate these laws and customs of war and engage in hostilities, they become unlawful combatants.*

Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Remarks at Chatham House, London, England, 20 February, 2002, at [www.state.gov/s/wci/rm/2002/8491.htm](http://www.state.gov/s/wci/rm/2002/8491.htm) as of 22 March, 2004 at 4:37pm.

<sup>24</sup> See White House Fact Sheet on Status of Detainees at Guantanamo, of 7 February, 2002. <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> as of 22 March, 2004 at 3:41pm.

<sup>25</sup> Murphy has noted that, '[t]he practical effect of not regarding the detainees as prisoners of war under the Third Geneva Convention [is] not clear, since the Bush administration asserted that it would treat the detainees humanely and in a fashion consistent with the principles of the Convention'.



commonly vest in an executive branch of government. Even under the application of a liberal margin of appreciation, it is difficult to justify such a classification considering the degree of separation between these combatants and the terrorist threat faced by the U.S. particularly given the circumstances of their apprehension.<sup>26</sup> Additionally, given the amorphous nature of terrorism, such emergency powers vesting in the President are open to significant abuse.<sup>27</sup> Almost any military campaign and/or human rights violation is capable of justification through the threat of terrorism. In support of this the Californian 9<sup>th</sup> Circuit stated in *Gherebi v. Bush* on 18 December, 2003 that,<sup>28</sup>

*[w]e simply cannot accept the government's position that the executive branch possesses the unchecked authority to imprison indefinitely any persons, foreign included, on territory under the sole jurisdiction of the United States without permitting such prisoners recourse of any kind to any judicial forum or even access to counsel, regardless of the length or manner of their confinement.*

Despite the fact that this reasoning has been affirmed by the U.S. Supreme Court,<sup>29</sup> the Executive's desire to avoid the operation of domestic procedures in the name of fighting terror may give rise to a swing in ideology in which substantive right protection is sidelined.

President Bush did however, issue a Presidential Military Order on 13 November, 2001 which stated that members of Al Qaeda, or those who have aided or abetted such members, or conspired to commit acts of terror, or harboured such individuals, will be subject to detention and trial before a military commission.<sup>30</sup> Despite these assurances

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<sup>26</sup> Which came about as a result of a U.S. instigated attack on Afghanistan, a third party state.

<sup>27</sup> S. von Schorlemer has argued that 'there is a dangerous tendency to legitimize human rights violations under the pretext of combating terrorism', p. 265.

<sup>28</sup> As cited by P. Hess, 'Courts: Padilla, Other Prisoners have Rights' <http://www.washtimes.com/upi-breaking/20031218-062027-4659r.htm> as of 26 March, 2003 at 3:44pm. At the time of writing the case was yet to be heard by the Supreme Court.

<sup>29</sup> See the Supreme Court decision in *Hamdi v Rumsfeld*, 03-6696 28 June 2004, where it was held that a citizen held within the United States had the right to contest the factual basis of an 'illegal combatant' determination before a neutral decision-maker. See also the Supreme Court decision in *Rasul v Bush* 03-334 28 June 2004, where it was held that Courts of the United States had the authority to hear a petition for a writ of habeas corpus filed by foreign nationals captured abroad and held at Guantanamo Bay.

<sup>30</sup> Section 2(1)(i), (ii) & (iii), & Section 3, & Section 4. See [www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html](http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html). See also the useful fact sheet on the Department of Defence order on Military Commissions, 21/03/02, available at <http://www.dod.mil/news/Mar2002/d20020321fact.pdf> as of 26 March, 2004 at 10:38am. United States Department of Defense, News Release, 21 March, 2002 No 140-02 available at [http://www.dod.mil/releases/2002/b03212002\\_bt140-02.html](http://www.dod.mil/releases/2002/b03212002_bt140-02.html) as of 26 March, 2004 at 10:54am. After almost two years of detention and the unfulfilled promise of the establishment of a military commission

it took the Supreme Court decisions of *Rasul*, *Hamdi*, and *Padilla* for the Combatant Status Review Tribunals to be established.<sup>31</sup>

Additionally, it can be seen that along with the U.S. declaration that these combatants are 'illegal', their use of an overseas naval base may also be seen as an attempt to avoid, what may otherwise entail, the application of international and domestic human rights safeguards. These actions of the U.S. are to be more appropriately interpreted as acts of right avoidance rather than acts of right rebalance.

*The United Kingdom: Human Rights Act 1998 and the European Convention on Human Rights*

A *The Protection of Human Rights*

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to try detained suspects, legal counsel was assigned for a Guantanamo Detainee, David Hicks. See United States Department of Defense, News Release, 03 December, 2003 No 912-03 'DOD Assign Legal Counsel for Guantanamo Detainee'. <http://www.dod.mil/releases/2003/nr20031203-0721.html> as of 26 March, 2004 at 12:47pm. See also United States Department of Defense, News Release, 18 December, 2003 No 961-03 'Defense Counsel Assigned to Salim Ahmed Hamden'. <http://www.dod.mil/releases/2003/nr20031218-0792.html> as of 26 March, 2004 at 12:55pm and United States Department of Defense, News Release, 06 February, 2004 No 080-04 'Guantanamo Detainees Assigned Defense Counsel'. <http://www.dod.mil/releases/2004/nr20040206-0328.html> as of 26 March, 2004 at 12:57pm. Although no detainee has yet been before the military commission, two have been charged with conspiracy to commit war crimes. See United States Department of Defense, News Release, 24 February, 2004 No 122-04 'Two Guantanamo Detainees Charged'. <http://www.dod.mil/releases/2004/nr20040224-0363.html> as of 26 March, 2004 at 1:12pm.

<sup>31</sup> After almost two years of detention and the unfulfilled promise of the establishment of a military commission to try detained suspects, legal counsel was assigned for a Guantanamo Detainee, David Hicks. See United States Department of Defense, News Release, 03 December, 2003 No 912-03 'DOD Assign Legal Counsel for Guantanamo Detainee'. <http://www.dod.mil/releases/2003/nr20031203-0721.html> as of 26 March, 2004 at 12:47pm. See also United States Department of Defense, News Release, 18 December, 2003 No 961-03 'Defense Counsel Assigned to Salim Ahmed Hamden'. <http://www.dod.mil/releases/2003/nr20031218-0792.html> as of 26 March, 2004 at 12:55pm and United States Department of Defense, News Release, 06 February, 2004 No 080-04 'Guantanamo Detainees Assigned Defense Counsel'. <http://www.dod.mil/releases/2004/nr20040206-0328.html> as of 26 March, 2004 at 12:57. For developments after the decisions of the United States Supreme Court in *Rasul*, *Hamdi* and *Padilla* see, *Hamden v Rumsfeld* 04-1519, available at [http://story.news.yahoo.com/fc?cid=34&tmpl=fc&in=World&cat=Guantanamo\\_Detainees](http://story.news.yahoo.com/fc?cid=34&tmpl=fc&in=World&cat=Guantanamo_Detainees) as of 9 November 2004, at 10:30am see 'Combatant Status Review Tribunal Order Issued', Press Release No. 651-04, July 7, 2004, <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> and <http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf>. See also T. Locy, 'Guantanamo proceedings full of challenges Military officers stumble through first tribunal since World War II' USA Today, (8 Nov, 2004) available at, [http://www.usatoday.com/printedition/news/20041108/a\\_gitmomain08.art.htm](http://www.usatoday.com/printedition/news/20041108/a_gitmomain08.art.htm) as of 9 November 2004 at 11:06am and T. Locy, 'Hearings highlight frustration, differences' USA Today (8 Nov, 2004) available at, [http://www.usatoday.com/printedition/news/20041108/a\\_gitmoone08.art.htm](http://www.usatoday.com/printedition/news/20041108/a_gitmoone08.art.htm) as of 9 November 2004 at 11:14am.

Exhibiting a more flexible system of right protection the system of the U.K. has been traditionally and naively interpreted as providing less protection to human rights. The U.K. constitutional regime is fluid and flexible and therefore allows for significant intra-constitutional movement. The rights contained within the Human Rights Act 1998 (HRA) are far from absolute and cannot be defined as a Bill of Rights. In fact, prior to October 2000 the use of the word 'Rights' at all in the domestic sense was a misnomer.<sup>32</sup> Prior to the HRA<sup>33</sup> there simply were no individual rights expressly recognised by the domestic law of the U.K.<sup>34</sup> Acts usurping the rights of individuals therefore faced little to no legal impediment<sup>35</sup> and direct enforcement was near impossible.<sup>36</sup> However, the enactment of the HRA within the environment of the

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<sup>32</sup> David Feldman has observed that,

*The United Kingdom's constitution is almost entirely procedural ... [which] are concerned almost entirely with how laws may be made and legal change achieved, and tell us little about the objectives or values which may justify particular rules or outcomes in legal or political argument.*

D. Feldman, 'The Human Rights Act 1998 and Constitutional Principles' 19(2) Legal Studies (1999) 165. Furthermore, Laws LJ has noted that the British system was historically one where,

*... the very assertion of constitutional rights as such would have been something of a misnomer, for there was in general no hierarchy of rights, no distinction between "constitutional" and other rights. Every Act of Parliament had the same standing in law as every other, and so far as rights were given by judge-made law, they could offer no competition to the status of statutes.*

*International Transport Roth GmbH v Home Secretary* [2002] 3 WLR 344, 370 at para 70.

<sup>33</sup> Which came into force for the whole U.K. on 2 October 2000.

<sup>34</sup> Despite this fact, Leane has noted that,

*There has been a long history of individual rights in declaratory and legislative statements and in the common law, though it was never a comprehensive "rights regime" and enjoyed no special constitutional status. The English judiciary did not endorse a robust framework of rights and was not willing to challenge or restrain legislative "elective dictatorship".*

G. Leane, 'Enacting Bills of Rights: Canada and the Curious Case of New Zealand's "Thin" Democracy', 26 HRQ [2004] 152, pp. 156-157.

<sup>35</sup> Often referred to as the negative approach to the protection of human rights. Speaking in relation to this system Lord Irvine stated in 1998 that,

*...the negative approach offers little protection against a creeping erosion of freedom by a legislature willing to countenance infringement of liberty or simply blind to the effect of an otherwise well intentioned piece of law. [1998] Public Law, at 224.*

<sup>36</sup> Subject to the bringing of a case to the European Court of Human Rights in Strasbourg under the European Convention of Human Rights. In fact, the right of individual petition was only allowed by the U.K. in December of 1965. The unavailability of a domestic remedy for litigants until the enactment of the HRA is an acknowledgement of the dualist theory as to the relationship between international and domestic jurisdictions, in operation in the United Kingdom.

common law doctrine of parliamentary sovereignty has enabled the establishment of rights to become a limited reality.<sup>37</sup>

The HRA incorporates the provisions of the European Convention of Human Rights (ECHR) into domestic legislation.<sup>38</sup> Although the Convention came into force in September of 1953 it was not incorporated into the domestic law of the U.K. until October 2000.<sup>39</sup> Significant debate and the unique and traditional basis of the U.K. constitution resulted in a subservient bill of rights.<sup>40</sup> Not only does the HRA contain

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<sup>37</sup> However, the HRA has been described only as a 'major step towards a full British Bill of Rights'. Lord Lester of Herne Hill QC 'Human Rights and the British Constitution' in J. Jowell & D. Oliver, (eds) *The Changing Constitution* (Oxford: Oxford University Press, 4<sup>th</sup> edn., 2000). p. 100.

<sup>38</sup> Strictly speaking the purpose of the HRA is to 'give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights' (Long Title of the Human Rights Act 1998. Sydney Kentridge QC has noted that '[t]here can be no doubt that a new, home-grown, British Bill of Rights would have looked rather different'. S. Kentridge QC, 'The incorporation of the European Convention on Human Rights', in University of Cambridge Centre for Public Law (ed) *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998), ch 7, p 69. See also Feldman, p. 172-173. Leane speculates that by merely incorporating the provisions of the ECHR the Human Rights Act perhaps fails,

*... to manifest an authentically "English" conception of rights ... [as i]ts effect is simply to allow citizens to pursue their rights in UK courts rather than having to go to the expensive and slow Strasbourg Court.*

Leane, p 157.

<sup>39</sup> Being the date in which the Human Rights Act 1998 came into force. This delay was in contravention of Article 13 of the ECHR which stated that member nations were to provide national remedies. Commenting on the delay of the United Kingdom in incorporating the Convention into domestic law Lord Irvine stated in February of 2001 in a speech to the Bar Association of Madrid that,

*Our fifty-year long failure to incorporate the Convention into domestic law was aberrant when compared with the crucial role that Britain played in its conception and drafting. Our failure was due to a historic hostility to incorporation based on two misconceptions. First, an outdated – and exaggerated – view of the efficacy of political accountability as a means of securing the protection of fundamental rights. Secondly, a fear of undermining Parliamentary Sovereignty and transferring power to unelected judges.*  
<http://www.homeoffice.gov.uk/hract/madridspeech.htm>

See also J. Straw and P. Boateng, 'Bringing Rights Home: Labour's plans to incorporate the European Convention on Human Rights into United Kingdom Law' [1997] EHRLR 71 & J. Wadham, 'Bringing rights half-way home' [1997] EHRLR 141. Both of these commentaries discuss the *Bringing Rights Home* consultation paper that ultimately lead to the issue being included on New Labours 1997 election manifesto. After the election the Human Rights Bill was introduced on 23 October 1997 after the issue was substantively raised by the introduction of the government's White Paper, *Rights Brought Home: The Human Rights Bill* Cm 3782 (London: The Stationary Office, 1997).

<sup>40</sup> Feldman notes that, 'Entrenchment and judicial review of primary legislation would also have threatened both the traditional view of parliamentary supremacy and the separation of powers between Parliament and the judges' p. 169. See also Kentridge QC, 'Parliamentary Supremacy and the Judiciary Under a Bill of Rights: Some Lessons from the Commonwealth' [1997] P.L. 96 for discussion on the merits of a subservient bill of rights over entrenchment. Furthermore, see Sir John Laws who argues that 'the idea of a rights-based society represents an immature stage in the development of a free and just society'. The Honourable Sir J. Laws, 'The Limitations of Human Rights' [1998] P.L. 245, 255. Additionally, Lord MacKay, then Lord Chancellor said in 1996 that,

provisions limiting the effect of the Rights encapsulated within the ECHR, but the rights of the ECHR itself are both very generally worded and contain express provisions which steer many of the rights away from absolute authority. Before briefly examining some of the principal rights incorporated by the HRA I will first examine the operational procedures of the Act.

Having obtained significant stimulation from the NZBRA the HRA incorporates provisions securing rights while simultaneously safe guarding Parliamentary Sovereignty.<sup>41</sup> The operational provisions of the Act for the purposes of judicial navigation are sections 3(1), 3(2) and its paragraphs, and section 4.<sup>42</sup> Section 3(1) provides a general interpretative instruction (to, where possible, interpret legislation in a compatible way with the provisions of the HRA), to all those who are empowered to interpret and apply legislation of the United Kingdom.<sup>43</sup> Section 3(2)(b) applies

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*Incorporation of the European Convention or a Bill of Rights as the yardstick by which Acts of Parliament are to be measured would inevitably draw judges into making decisions of a far more political nature, measuring policy against abstract principles with possible implications for the development of broad social and economic policy which is and has been accepted by the judiciary to be properly the preserve of Parliament.*

Lord MacKay, 'Parliament and the Judges - A Constitutional Challenge?', speech to the Citizenship Foundation, Saddlers Hall, London, July 8, 1996. It is acknowledged that because of its subservience it is a moot point as to whether the HRA is in fact a 'Bill of Rights' at all. For general reading also refer, Bamforth, 'Parliamentary Sovereignty and the Human Rights Act 1998' [1998] P.L. 572, Gearty, 'Reconciling Parliamentary Democracy and Human Rights' 118 LQR (2002) 248, Ewing, 'The Human Rights Act and Parliamentary Democracy' 62 (1) MLR (1999) 79.

<sup>41</sup> It must be remembered that before the enactment of the HRA the UK did not have a bill of 'Rights' at all. The Bill of Rights Act 1688 related more to the rights of Parliament over the Crown as opposed to tangible rights of individuals. Therefore up until October 2000 when the HRA came into effect, the UK operated by way of a system of 'negative' rights in relation to those provisions cordially provided for as 'Rights' in most other jurisdictions.

<sup>42</sup> Additional sections of importance are s. 2 the persuasive nature of decisions of the European Court of Human Rights. S. 6, the obligation of public authorities not to act contrary to the Rights within the Act unless acting under direct authority of legislation. S. 10 which affords remedial powers on Ministers of the Crown to amend legislation deemed incompatible pursuant to s. 4. S. 19 which provides for a statement of compatibility to be made after analysis of new Bills with the HRA, for the assistance of Parliament.

<sup>43</sup> Section 3(1) states;

*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*

This provision applies to all agencies that are entrusted with interpreting and applying legislation, whether public or private. Speaking in relation to the interpretative obligation of s3, Lord Steyn has stated,

*...the interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature.*

Lord Steyn, *R v A* [2001] UKHL 25, para 44.

directly to the judiciary and provides that section 3(1) does not affect the validity of all inconsistent primary legislation, therefore preserving the supremacy of Parliament.<sup>44</sup> Likewise, s3(2)(c) insures the continued operation of all secondary legislation, but only where the empowering primary legislation does not allow for its removal.<sup>45</sup> In the case of a Superior Court's inability to interpret domestic legislation in a consistent manner with the provisions of the HRA<sup>46</sup> s4 notably allows for a 'declaration of incompatibility' to be issued notwithstanding the continued application of the inconsistent provision.<sup>47</sup> Therefore within these sections the preservation of parliamentary sovereignty is retained by ensuring the continued validity of primary legislation notwithstanding any inconsistency.<sup>48</sup> I will now move to the ECHR itself.

The European Convention encapsulates basic human rights which can in turn be relied upon and enforced within monist structured member states, or dualist States like the United Kingdom, who have expressly incorporated the Convention into domestic law.<sup>49</sup> Notwithstanding the idiosyncrasies of the HRA's operational provisions discussed above,<sup>50</sup> the Convention itself implicitly establishes a hierarchy between the rights it incorporates.<sup>51</sup> While Article 15(1) provides for Parties to legitimately derogate from the rights under the Convention '[i]n time of war or other public emergency threatening the life of the nation...',<sup>52</sup> it attempts to preserve the absolutism of particular fundamental rights under paragraph 2 of the Article.<sup>53</sup>

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<sup>44</sup> Section 3(2)(b) states;

[s3(1)] ...does not affect the validity, continuing operation or enforcement of any incompatible primary legislation;

<sup>45</sup> Section 3(2)(c) states;

[this section]...does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if...legislation prevents removal of the incompatibility.

Therefore conversely any inconsistent secondary legislation whose removal is not prohibited by its legitimising primary legislation, may be removed by a superior Court.

<sup>46</sup> Pursuant to s3(1).

<sup>47</sup> Where a Court is considering making a declaration s5(1) stipulates that the Crown is entitled to notice.

<sup>48</sup> In this respect s3(2)(b) is not dissimilar in operation to section 4 of the NZBRA.

<sup>49</sup> Alternatively, enforcement may occur through the European Court of Human Rights.

<sup>50</sup> Namely the continued operation of inconsistent primary legislation pursuant to s3(2)(b).

<sup>51</sup> For further reading refer Jonathan Black-Branch who argues that the European Convention on Human Rights establishes three clear levels of Rights, Embedded (absolute non-derogable) rights, Tentative (derogable but unqualified) rights, and finally Tenuous (derogable qualified) rights. 'The Derogation of Rights under the UK Human Rights Act: Diminishing International Standards?' [2001] SLR vol. 22, No. 1, p. 71.

<sup>52</sup> In addition to this catch-all provision, many individual provisions encapsulate limitations within their parameters. Article 2 for example secures the right to life as protected by law. However, sub-article 2

From this discussion of the HRA it is clear the system of right protection in operation within the U.K. is significantly more flexible than that which operates within the U.S. By failing to fulfil the criteria of a right based society<sup>54</sup> to the same extent as the U.S.,<sup>55</sup> the U.K. system has an inherent flexibility that allows rights to be more easily prioritised against often competing considerations. Notwithstanding this observation the actions of the U.K. post September 11, 2001 cannot be interpreted as acts of right re-balance but are more appropriately defined as acts of right avoidance.

Having briefly outlined the Human Rights legislative framework in operation in the UK I will now move to examine how the developments of post September 11 have effected human rights in the United Kingdom.

#### B *The United Kingdom: The Anti-Terrorism, Crime and Security Act 2001.*<sup>56</sup>

The Anti-Terrorism, Crime and Security Act 2001 (ATCSA) and associated ECHR derogations are examples of right avoidance and not right rebalance. The ATCSA has been described as an example of ‘draconian’<sup>57</sup> legislation after coming about as a direct result of the events of September 11, 2001. Building upon the restrictions within the Terrorism Act 2000, the ATCSA encroaches significantly upon the fundamentals of democracy itself.

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provides for three exceptions including death, which comes about in the use of reasonable force ‘in order to effect a lawful arrest or to prevent the escape of a person lawfully detained’.

<sup>53</sup> Article 15(1) States that,

*No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*

It is to be noted that this provision has not been enacted into U.K. domestic law via the Human Rights Act 1998. For further discussion see J. Black-Branch, ‘The Derogation of Rights under the UK Human Rights Act: Diminishing International Standards?’, (2001) 22 Statute Law Review 71.

<sup>54</sup> Laws LJ describes the British system as one which is ‘stand[ing] at an intermediate state between parliamentary supremacy and constitutional supremacy’. *International Transport Roth GmbH v Home Secretary* [2002] 3 WLR 344, 370 at para 71.

<sup>55</sup> Applying the three pronged test of Black-Branch, supra n 15.

<sup>56</sup> For a comprehensive review of the Act and its significance see the Report of the Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001 Review: Report*, 18 December 2003, HC 100 2003-4. Available at [http://www.atcsact-review.org.uk/lib/documents/18\\_12\\_2003/Report.pdf](http://www.atcsact-review.org.uk/lib/documents/18_12_2003/Report.pdf) as of 29 March 2004 at 5:23pm.

<sup>57</sup> H, Fenwick, ‘The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?’ [2002] MLR vol. 65, p. 724. Fenwick goes on to argue that anti-terrorist measures must



The principle democratic difficulty with the Act can be found in the power afforded to the Secretary of State pursuant to Part 4. 'Immigration and Asylum'. This Part allows for the Secretary of State to certify someone as being an 'international terrorist' upon a 'reasonable' suspicion.<sup>58</sup> Furthermore pursuant to s22 detention of such suspects is allowable notwithstanding '... the fact that (whether temporarily or indefinitely) the action cannot result in his removal from the United Kingdom ...'.<sup>59</sup> Consequently this provision placed the Bill in contravention of Article 5(1)(f) of the ECHR.<sup>60</sup> Requiring either an amendment to the Bill or derogation from Article 5(1), the United Kingdom Government opted for derogation.<sup>61</sup> Consequently pursuant to the Human Rights Act (Designated Derogation) Order 2001, which came into effect on the 13 November 2001, a 'state of emergency' in relation to the threat of international terrorism was declared<sup>62</sup> followed by a derogation from the UK's obligations under the inconsistent Article.<sup>63</sup>

Therefore, despite protests that the declaration of a public emergency made in order to satisfy the requirements of Article 15(1) was unjustified and used merely as a device

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meet 'the most rigorous tests for proportionality' because of their possible friction with the fundamentals of democracy. Fenwick adds that the ATCSA fails to meet such tests.

<sup>58</sup> Refer section 21, Anti-Terrorism, Crime and Security Act 2001.

<sup>59</sup> Section 22 (1). The section continues by stating that removal may be prevented because of;

- (a) *a point of law which wholly or partly relates to an international agreement, [for instance the deportation of a suspect may result in a breach of his fundamental human rights] or*
- (b) *a practical consideration.*

<sup>60</sup> Article 5 (1) states that;

- (1) *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;*
- ...
- (f) *the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

See also the decision of the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413.

<sup>61</sup> Amendment or derogation was required before a certificate of consistency between the Bill and the HRA could be issued pursuant to Section 19.

<sup>62</sup> Pursuant to Article 15(1) of the ECHR, for criticisms of the use of this declaration of emergency see Joint Committee on Human Rights, paragraph 4, available at, <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/158/15804.htm#a4> as of 10 November 2004 at 5:05pm.

<sup>63</sup> Additionally, in order to ensure compliance with the United Kingdom's other international obligations (a further requirement of Article 15 (1)) a derogation was entered into pursuant to Article 4



to secure the enactment of the ATCSA,<sup>64</sup> this action stands as an example of intra-constitutional activity. The HRA did not stop the enactment of the ATCSA, but it did ensure that constitutional mechanisms of procedure were followed.

### *The Civil Contingencies Bill 2003:*

By proposing extensive updates to the authority of the government to declare states of emergency, the Civil Contingencies Bill attempts to bring together the currently diffused law in this area.<sup>65</sup> While not solely in reply to the issue of terrorism, this new threat has provided significant impetus for the Bill. The Report of the Joint Committee on the Draft Civil Contingencies Bill summarised the Draft Bill as having two fundamental goals. Firstly, it seeks to empower local bodies with a duty to compile contingency plans that deal with various emergencies. Secondly, it seeks to avail governments with powers to make regulations to deal with particular emergency situations.<sup>66</sup> In serving these ends, the Bill is divided into three parts. Part one seeks to create an obligation for certain local bodies to establish contingency plans. Whereas part one would only apply to the England and Wales, it is anticipated that part two would deal with the whole of the U.K. This part initially provided for the making of a

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(1) of the International Convention on Civil and Political Rights in relation to Article 9 of the same convention. See *UK Derogation under the ICCPR* of 18 December 2001.

<sup>64</sup> There were also concerns as to the timing of the derogation, which was made before the issuing of a statement of compatibility (s19 of the HRA) between the ATCS Bill and the HRA. This has been said to have potentially misguided Parliament as to the compatibility of the Bill with the HRA. H. Fenwick, 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?' [2002] 65 MLR 724, 728. For the history of the derogations see, The Prevention of Terrorism (Temporary Provisions) Act 1984, which allowed for the detention of those suspected of being connected with terrorism within Northern Ireland. Although only allowing for detention for a period of up to five days (section 12) the U.K. was found to be in breach of its obligations under the ECHR in the European Court of Human Rights case of *Brogan and Others* (1988) 11 EHRR 117.

<sup>65</sup> The law relating the executive's ability to declare states of emergency is currently spread across acts such as the Emergency Powers Act 1920 (enacted, at least in part, in response to the growing authority of trade unions C. Barclay, *The Civil Contingencies Bill: Bill 14 of 2003-04* Science and Environment, House of Commons Research Paper 04/07, 15 January 2004, p. 7), The Animal Health Act 2002, The Civil Protection in Peacetime Act 1986, The Civil Defence (Grant) Act 2002, and under the executive's exercise of the royal prerogative. For the most recent discussion on the use of the royal prerogative within the United Kingdom see report of the Public Administration Select Committee, *Fourth Report: Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 422), available at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/42202.htm> as of 29 March, 2004 at 5:02pm. See also the associated press release; Press Notice No. 14, PASC Urges New Powers to Tame the Prerogative', Session 2003-4. Available at [http://www.parliament.uk/parliamentary\\_committees/public\\_administration\\_select\\_committee/pasc\\_03\\_04\\_pn\\_14.cfm](http://www.parliament.uk/parliamentary_committees/public_administration_select_committee/pasc_03_04_pn_14.cfm) as of 29 March, 2004 at 5:21pm.

<sup>66</sup> Joint Committee on the Draft Civil Contingencies Bill, *Draft Civil Contingencies Bill*, 28 November 2003, HC 1074 2002-3.

proclamation by Her Majesty or by the Secretary of State. As well as allowing for regional and national states of emergency, the legislation, in replacing the Emergency Powers Act 1920<sup>67</sup> allows for Her Majesty or the Secretary of State to produce regulations to mitigate, control or prevent the effects of an emergency.<sup>68</sup> Finally, part three of the Bill deals with the administrative matters of repeals, the short title and the act's intended commencement.

Significant controversy has arisen over the wording and ambit of part two in particular. It has been noted in the Report of the Joint Committee that,

*[w]e have concerns, ... that the draft Bill lacks sufficient detail or provides adequate safeguards against potential misuse.*

The Committee continued by observing that,<sup>69</sup>

*[o]ur concern, ... is to ensure that the Bill does not provide any exploitable opportunity to misuse emergency powers and potentially, in a worst case scenario, allow for the dismantling of democracy.*

As noted, the Human Rights Act 1998, while preserving parliamentary sovereignty does allow for the judiciary to quash what it believes to be incompatible secondary legislation. However, within the Draft Bill provision was made for regulations under the proposed legislation to have the effect of primary legislation.<sup>70</sup> In relation to this clause, the Joint Committee noted that,<sup>71</sup>

*[w]e do not believe that the Government has demonstrated a clear and compelling need for clause 25.*

In response to such criticism<sup>72</sup> the government published a revised Bill in January 2004.<sup>73</sup> This new Bill deleted Clause 25. Additionally, the new definitions of emergency encapsulated within the 2004 Bill defines an emergency as 'an event or

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<sup>67</sup> And the Emergency Powers Act (Northern Ireland) 1926.

<sup>68</sup> Clause 20.

<sup>69</sup> *Supra*, n. 119.

<sup>70</sup> Clause 25. This would therefore limit the judiciaries' ability to quash the offending provision. The most that could be done in such circumstances would be the issuing of a declaration of incompatibility under section 4 of the Human Rights Act 1998.

<sup>71</sup> *Supra*, n. 119.

<sup>72</sup> *Inter alia*.

<sup>73</sup> See Cabinet Office, *The Government's Response to the Report of the Joint Committee on the draft Civil Contingencies Bill*, January 2004, Cm 6078.

situation which threatens serious damage to' human welfare, the environment or the security of the United Kingdom.<sup>74</sup>

As indicated above, part two of the Draft Bill initially provided for declarations of emergencies. However, the Bill of January 2004 does away with such declarations altogether.<sup>75</sup> Furthermore, the new Bill modifies the Government's 'triple lock' system of constitutional protection.<sup>76</sup>

In response to the amendments made within the 2004 Bill, JUSTICE<sup>77</sup> stated that it welcomed,<sup>78</sup>

*... the government's willingness to listen to criticism of its draft legislation, as shown by some significant amendments made.*

While remaining wary of the 2004 Bill, LIBERTY<sup>79</sup> stated that,<sup>80</sup>

*[t]he government has taken a step in the right direction. Their initial proposals were quite terrifying.*

A number of points can be made as to the significance of this Bill and its associated debate. Firstly, the mere existence of such a Bill ought to be heralded as a constitutional success. With a potentially disjointed (under the myriad of legislative articles currently in place) and ultimately wide discretion (as is apparent under the use of the Royal Prerogative as a catch all authority) the U.K. government is to be commended on their attempt to comprehensively legislate on this area. Instead of

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<sup>74</sup> See Clauses 1(1) and 18(1) of the January 2004 Bill.

<sup>75</sup> For a general discussion on the UK's use of declarations of states of emergency, see C. Barclay p. 18-22.

<sup>76</sup> Under the initial Consultation Document of June 2003 the Government sought to explain the limitations upon the application of the wide definition of emergency under Clause 18, see Draft Civil Contingencies Bill, Consultation Document – June 2003, Chapter 5, p. 28 para. 19. Document available at, [www.cabinet-office.gov.uk/reports/annualreport/dept-report.asp](http://www.cabinet-office.gov.uk/reports/annualreport/dept-report.asp). The document set out three provisions which were to be met before the emergency powers could be invoked. Firstly, the situation, although coming within article 18, still had to be sufficiently serious to warrant the use of the powers. Secondly, emergency regulations ought only to be made where there was a 'genuine need'. Finally, such measures were to be limited to the 'minimum geographical extent required'. However, this 'triple lock' system of constitutional protection did not expressly feature in the Draft Bill. In response to the criticisms of the Joint Committee the Government inserted new 'triple lock' provisions into the Bill. The new provisions provide for a 'serious threat of damage', the requirement of necessity and finally a provision requiring regulations to be in 'due proportion' to the emergency or portion thereof which it is aimed.

<sup>77</sup> JUSTICE is an independent and significantly influential human rights organisation.

<sup>78</sup> JUSTICE Press Notice, 'JUSTICE welcomes government rethink on emergency powers Bill', 7 January 2004.

<sup>79</sup> LIBERTY is a United Kingdom civil liberties and human rights based organisation.

<sup>80</sup> LIBERTY Press Release, 'Response to Government's Civil Contingencies Bill', 7 January 2004.

exploiting the current disparities, the government has sought to place this power on a more stable footing. Secondly, despite their manifest desire to legislate for a wide and largely unfettered authority the Executive has been persuaded by the significant constitutional discussion surrounding the initial proposal of June 2003. This stands as further evidence that the more flexible system of the U.K. does in fact encourage its use. While the substantive content of the legislation itself may be heavily criticised, any associated transformation of ideology that may accompany such moves are correspondingly more legitimate than that which may develop from a system which has been sidelined due to its difficulty of use.

*New Zealand: A Bill of Rights in name only?*<sup>81</sup>

New Zealand's historical experience in relation to the protection of fundamental human rights is very similar to that which has been outlined for the United Kingdom. Enacted in 1990 the New Zealand Bill of Rights Act stands as an example of an Act that was intended, upon introduction as a Bill, to be entrenched. However, in its final enacted form a rather sickly and feeble sibling appeared. When discussing the effect of the NZBRA three sections are of principle importance. Here I shall give a brief overview of Sections 4, 5 and 6, being the operational provisions of the Act.

Section 4 prescribes that no court shall hold an enactment ineffective or invalid or decline to apply any provision by reason only of inconsistency with any right encapsulated in the NZBRA.<sup>82</sup> Section 5 provides that the rights and freedoms in the NZBRA are subject '*only* to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.<sup>83</sup> The significance of this provision, which on some interpretations places significant power with the judiciary, is clouded. Confusion principally emanates from the fact that section 5 is subject to

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<sup>81</sup> It is interesting to note the comments of Justice Scalia of the United States Supreme Court who stated in a lecture at Canterbury University New Zealand (1999) that any nation could enact a Bill of Rights but that without a Constitutional framework in place to protect such documented rights that effectively the Bill is not worth the paper it is written on.

<sup>82</sup> As Rishworth has put it, section 4 of the Bill of Rights 'anticipates the lawful passage and dutiful application of legislation which is not reasonable in a free and democratic society' P Rishworth, 'Lord Cooke and the Bill of Rights', in P Rishworth (ed), *The Struggle for Simplicity in the Law* (1997). p. 296.

<sup>83</sup> Parenthesis added.

section 4.<sup>84</sup> Section 6 completes this cumbersome trio. This section seeks to ensure that where an interpretation that is consistent with the Bill of Rights is possible, then that interpretation is to be preferred. Therefore, section 4 looms over both section 5 and 6 with the result that judicial consensus as to their interrelationship has been difficult to obtain.

Ambiguity and confusion as to the intended scope and purpose of these sections has led to considerable divergence in their application. New Zealand enacted the Bill of Rights to affirm its commitment to the International Covenant on Civil and Political Rights 1966.<sup>85</sup> Initial proposals and discussion centred round an entrenched, supreme law Bill of Rights. The 'White Paper: A Bill of Rights for New Zealand' released in April of 1985 did not therefore propose wording as is now found in section 4. Only after the express rejection of an entrenched Bill of Rights was section 4 incorporated.<sup>86</sup> Difficulty therefore arises with the incompatibility of section 4 with section 5 in particular, which uses language of supreme law.<sup>87</sup> In summary, the principal cases in this area indicate a reluctance on behalf of the New Zealand judiciary to issue declarations of incompatibility in relation to the abrogation of substantive rights under the NZBRA.<sup>88</sup>

## CONCLUSION

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<sup>84</sup> With section 5 being subject to section 4 inadequate consideration is inevitably given to section 5. A Butler, 'Strengthening the Bill of Rights' p. 134.

<sup>85</sup> A Shaw, 'Arbitrary arrest and detention under the New Zealand Bill of Rights' (1993) NZLJ 142.

<sup>86</sup> Butler has stated that of the four structural problems with the New Zealand Bill of Rights, section 4 is the cause of each. The problems he proposes are: 'Strengthening the Bill of Rights' p. 132.

1. Not user-friendly
2. Minimal role for Parliament to assert its sovereignty
3. Creates a Janus-like role for the Courts
4. Unduly weak fulfilment of our international human rights obligations.

<sup>87</sup> P Rishworth 'Reflections on the Bill of Rights after *Quilter v Attorney-General*' p. 691. Rishworth further states that the problem results from section 5 using 'a form of words designed for a system that envisaged judicial review of legislation'. P Rishworth, 'Lord Cooke and the Bill of Rights' p. 310.

<sup>88</sup> For discussion on the approaches to sections 4, 5 and 6 see, F. Brookfield, 'Parliament, the Treaty, and Freedom. Millennial Hopes and Speculations' in P Joseph (ed) *Essays on the Constitution* (1995) p. 42, *Quilter v Attorney-General*, [1998] 1 NZLR 523, *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, *R v Poumako* [2000] 2 NZLR 695. See also the judgment of Hardie-Boys in *Ministry of Transport v Noort* [1992] 3 NZLR 260 and Fisher J. in *Herewini v Ministry of Transport* [1993] 2 NZLR 747, F. Brookfield, 'Constitutional Law' [1993] NZRLR 278. Thomas J. has surmised that much of the confusion around the application of these sections and the NZBRA in general is because it is not completely clear what a Bill of Rights means for New Zealand, P Rishworth, 'Reflections on the Bill of Rights after *Quilter v Attorney-General*' p. 689.

Discussion on the differing jurisdictional protection availed by New Zealand the United Kingdom and the United States illustrates a number of points. Firstly, these examples present us with a continuum of protective provisions in relation to Human Rights. New Zealand, offering the least protection, has experienced difficulty in applying sections 4, 5, and 6, (the operational provisions) of the NZBRA. The U.K. Human Rights Act eliminates much of the New Zealand debate by going one step further by expressly providing for both the making of Declarations of Incompatibility and the holding of qualifying secondary legislation void. From the actions of both the U.S. and the U.K. it can be seen that the more flexible U.K. system has actually encouraged its use by the executive, or at least provides little justification for its circumvention. However interpreted, the fact remains that in the fight against terror the democratic safeguards of the U.K. constitution have been used and not avoided. The U.S. executive administration has attempted to act largely outside of their domestic constitutional parameters. Notwithstanding this observation, both the U.K. and the U.S. have attempted to avoid the application of rights. Therefore their actions are not capable of reconciliation with traditional human rights ideology but are symbolic of a change in the application of rights. Despite classifications to the contrary, Guantanamo Bay, the utilisation of the enemy combatants doctrine, the Terrorist Act 2000, Anti-Terrorism, Crime and Security Act 2001 and the associated derogations from the ECHR cannot be seen as merely an exercise in the re-balancing of individual rights with rights. These events are more appropriately interpreted as perhaps introducing a new age in human rights ideology, where flexible constitutional systems are seen as more appropriate to rigid systems. Entrenched systems cannot prevent changes in ideology. Democracy must be allowed to develop for the 'good' or 'bad' of society.

Extrapolating from this, it is clear that if an ideological swing in mainstream human rights perceptions were to occur, that the system of substantive right protection in operation within New Zealand may no longer be seen as weak. With the absence of an entrenched system parliament, when faced with a problem which demands action, will find no alternative but to use the constitutional and democratic safeguards encapsulated within the legislative process to provide those answers which it sees as necessary.

The human rights movement has and will continue to experience significant strain in the wake of September 11. The reality is that as the 'war on terror' continues and the possibility and reality of further acts of terrorism increases, so too will the times of abnormal 'fear and prejudice' increase.<sup>89</sup> The 'war' has and will signal a significant change in the notion and application of human rights law. It is contended that as the war continues sympathy for a less strict adherence to human rights protection may develop in which rigid systems of right protection may become to be seen as inappropriate or at worst, race specific. If such a development were to solidify the judiciary may once again be placed in the position of mediating the harshness of an overly repressive parliament. Therefore, while the system of right protection within the U.K. is legislatively prepared for such a relationship (with the enactment of Sections 3 and 4 of the Human Rights Act 1998), the NZBRA is not. Far from shying away from their responsibilities, a more aggressive New Zealand judiciary is required in order to balance that country's more liberal constitutional system of right protection.

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<sup>89</sup> See the comments of Lord Scarman who in 1974, speaking in relation to the necessity for the UK to have an entrenched Bill of Rights, stated,

*[w]hen times are normal and fear is not stalking the land, English law sturdily protects the freedom of the individual and respects human personality. But when times are abnormally alive with fear and prejudice, the common law is at a disadvantage: it cannot resist the will, however frightened and prejudiced it may be, of Parliament.*

English Law- The New Dimension (1974) p. 15.